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NO. 35364-5-II

IN THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CLARK COUNTY SUPERIOR COURT NO. 18-3-03044-4

In re the Marriage of:

DAVID MILLER,

Respondent,

v.

WENDY MILLER,

Appellant.

BRIEF OF RESPONDENT

Michelle L. Prosser, WSBA #47486
Stahancyk, Kent & Hook, P.C.
400 West 11th Street
Vancouver, WA 98660
Telephone: (360) 750-9115

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I. Introduction

The issues raised in this appeal center on the trial court's denial of Appellant's (hereinafter "Wendy") motion for relief from judgment as to three out of four agreed orders executed by the parties during the pendency of their dissolution of marriage case. Wendy motioned the trial court to vacate the agreed orders based on CR 60(b)(1), (2), (4) and (11). The trial court denied Wendy's motion in its entirety and Wendy is asking this Court to find that the denial was an abuse of the trial court's discretion. The Trial Court did not abuse its discretion by denying Appellant's Motion for Relief from Judgment. The Trial Court did not abuse its discretion by denying Appellant's Motion for Reconsideration.

The Trial Court found and concluded that Wendy failed to provide an adequate basis in which to vacate the agreed Findings and Conclusions About a Marriage, the agreed Final Divorce Order and the agreed Child Support Order. The Trial Court found and concluded that there was no irregularity with entry of the agreed final Orders that would lead to the agreed orders being vacated pursuant to CR 60(B)(1). The Trial Court found and concluded that Wendy did not establish her incapacity to understand and make decisions as to signing the agreed final orders and therefore, there was not a basis to vacate the agreed final orders pursuant to CR 60(b)(2) or CR 60(b)(4). The Trial Court found and concluded that

none of the reasons asserted by Wendy based on CR 60(b)(11) provide an adequate basis to vacate the agreed final orders. Finally, the Trial Court ruled that each party would be liable for their own attorney fees. This court should affirm. Respondent David Miller (hereinafter “David”) submits the following Response to the Brief of Appellant.

II. ISSUES WITH ASSIGNMENTS OF ERROR

1. Whether it was within the trial court’s discretion to conclude that Wendy’s Motions for Relief from Judgment based on CR 60(b)(1)(2)(4) or (11) and for Suit fees should be denied (Assignments of Error #1 and #2) (CP 434-437).
2. Whether it was within the trial court’s discretion to conclude that Appellant “failed to demonstrate an adequate basis to vacate” the Child Support Order entered on May 15, 2018, the Findings and Conclusions About a Marriage entered on July 25, 2018 and the Final Divorce Order entered on July 25, 2018, because Appellant did not meet her burden in proving an adequate basis for relief from judgment based on CR 60(b)(1)(2)(4) or (11)? (Assignments of Error #2) (CP 434-437).
3. Whether it was within the trial court’s discretion to conclude that Wendy signed the final orders entered on May 15, 2018 and July 25, 2018 and that those final orders contained provisions agreed to by the parties. (Assignment of Error #3)

4. Whether it was within the trial court's discretion to deny Wendy's motion pursuant to CR 60(b)(1) in part by concluding that there was no dispute regarding the accuracy of the factual representations in David's Declaration in Support of entry of the final orders, including the representation that the proposed division of assets was fair and equitable," when Wendy also agreed to the factual representations in her execution of the agreed final orders? (Assignment of Error #3) (CP 435 and 437)
5. Whether it was within the trial court's discretion to find that there was no irregularity when the parties signed the final orders prior to entry of the final orders and prior to the ninety (90) day waiting period required by RCW 26.09.030, when the declaration and final orders were not filed until after the ninety (90) day waiting period in denying Wendy's motion pursuant to CR 60(b)(1)? (Assignment of Error #5) (CP 435)
6. Whether it was within the trial court's discretion to find that Wendy failed to establish clear, cogent and convincing evidence that she was unable to make decisions and that her mental condition deprived her of the ability to comprehend the final orders in denying Wendy's motion pursuant to CR 60(b)(2) and (4). (Assignment of Error #4) (CP 436)
7. Whether it was within the trial court's discretion to conclude that under the circumstances of the case, CR 60(b)(11) does not provide an adequate basis to set aside the final orders, especially where the

Wendy acted upon and benefited from the final orders subsequent to signing them and prior to the agreed orders being entered by the trial court. (Assignment of Error #6) (CP 437)

8. Whether it was within the trial court's discretion to conclude that awarding attorney fees to Wendy would not be appropriate?
(Assignment of Error #7) (CP 437)
9. Whether it was within the trial court's discretion to conclude that Wendy's motion for reconsideration did not provide a basis to alter the order pursuant to CR 59(a)(1)(2) or (9) and should be denied when Wendy's motion was based on an initial incorrect caption on the trial court's written order denying Wendy's motion for relief from judgment (subsequently corrected) and based on the method/manner of service of the order? (Assignment of Error #8) (CP 432-433)
10. Whether it was within the trial court's discretion to conclude that the remainder of Wendy's motion for reconsideration addressed items evaluated by the trial court when considering Wendy's motion for relief from judgment and/or contained information that could have been included at the time of Wendy's motion for relief from judgment in denying Wendy's motion for reconsideration? (Assignment of Error #8) (CP 432-433)

III. STATEMENT OF ISSUES

1. Was the trial court's denial of Wendy's motion for Relief from judgment (asking the trial court to vacate some but not all of the agreed orders executed by the parties) an abuse of the trial court's discretion when Wendy was personally served with the Petition for Divorce on April 25, 2018. (See *Cover Page for Return of Service* with attached Return of Service, filed on May 2, 2018, not designated by Wendy but identified and requested to be designated by David with this Responsive Brief); when Wendy completed and signed a Response to the Petition for Divorce which was filed with the trial court; when the parties reached a global settlement of all pending issues in their dissolution of marriage case and signed agreed orders on May 14, 2018 consisting of a final Parenting Plan (CP 22-29), Child Support Order (CP 30-38), Findings and Conclusions About a Marriage (CP 44-50) and a Final Divorce Order (CP 51-56); when Wendy did not ask the trial court to vacate the final Parenting Plan signed at the same time as the other agreed final orders; when Wendy signed additional agreements and a quit claim deed after executing the agreed orders that acknowledged and acted on the agreed orders; when Wendy did not claim in her declarations to the trial court that she was not taking her medication or otherwise not following her mental health treatment plan at the time she signed the agreed final orders on May 14,

2018; when Wendy did not deny in her declarations to the trial court that her text messages to him being angry manipulation attempts by Wendy and not signs that she was not taking her medication or otherwise not following her mental health treatment plan; and when Wendy did not claim in her declarations to the trial court that she was unaware of the property or value of property under David's control or that David misrepresented the existence or value of any property to Wendy?

2. Was the trial court's ruling that Wendy was not entitled to need based attorney fees when Wendy had access to over \$77,000 in cash at the time she filed her motion within the trial court's discretion?
3. Should this Court award Wendy attorney fees on appeal?

IV. STATEMENT OF THE CASE

A. The Parties Marriage/Background

Wendy and David were married on June 10, 2002 in Honolulu, Hawaii and separated on April 16, 2018. Wendy (51 years old) was employed as a research analyst with the FBI up until she was notified of her termination in August 2018 (after the parties' divorce was finalized). (CP 85) David (50 years old) is a special agent with the

Department of Homeland Security. (CP 65) The parties have one (1) child, D.K.M. (age 12 at the time of the agreed final Parenting Plan). (CP 22).

B. The Petition for Divorce, Response, and Temporary Orders

In March 2018, Wendy was voluntarily admitted to Fairfax Behavioral Hospital and released from that facility on April 4, 2018. (CP 65, 279) When Wendy was released from Fairfax, she moved into her own apartment. (CP 357) After prior discussions regarding filing for dissolution accompanied by Wendy's request to move forward with the proceedings, on April 25, 2018, David filed a Petition for Divorce with the court. (CP 7-13) In the Petition for Divorce, David requests dissolution, due to the marriage being irretrievably broken. (CP 7). On April 25, 2018, Wendy was personally served a copy of the Summons, Petition for Divorce, Information form, and Notice of Appearance. (See Cover Page for Return of Service with attached Return of Service, filed on May 2, 2018)

On May 4, 2018, a Stipulated Interim Temporary Order was entered with the court, setting forth agreed to provisions between the parties, which includes, that the parties child remain in the custody/care of David at the family home; Wendy would return to work and/or apply for disability; Wendy would retain use of the 2016 Kia Sorrento; David would retain use of the 2012 Subaru Impreza; David would continue to pay a

number of household expenses, including paying off two (2) of Wendy's credit cards. (CP14-16) On May 8, 2018, Wendy filed a Response to Petition About a Marriage with the court. In the Response, Wendy agreed to every provision set forth in the Petition for Divorce, and made no requests for maintenance, child support, etc. (CP 17-21) Wendy also requested that the trial court approve a Final Divorce Order. (CP 20)

C. Declaration in Support of Final Orders and Final Orders

On May 15, 2018, the parties filed an agreed to Final Parenting Plan, in which Wendy and David agreed that long-term emotional and/or physical problems prevent her ability to parent. (CP 23) The Final Parenting Plan provided that the parties' daughter would live primarily with David and Wendy would have parenting time for a two-hour period each week. (CP 23) That same day, the Final Child Support Order was filed, whereby Wendy's monthly child support obligation was deviated to \$0.00 due to Wendy being responsible for counseling costs. (CP 32-33)

Also on May 15, 2018, David executed a Declaration in Support of Entry of Final Divorce Order Without a Hearing. However, the Declaration in Support of Entry of Final Divorce was not entered with the court until July 25, 2018, following the end of the ninety (90) day waiting period for entry of final orders.

The parties agreed to and executed the final orders on May 14, 2018. On July 25, 2018, after the expiration of the ninety (90) day waiting

period, the Findings and Conclusions about a Marriage and the Final Divorce Order were entered with the court. The Final Divorce Order set forth the division of assets/liabilities, to which both parties agreed. Per the Final Divorce Order, Wendy was awarded an offsetting judgment in the amount of \$84,136.75, the 2012 Subaru Impreza, bank/investment accounts in her name, personal property items, as well as debts held in her name. (CP 56) David was awarded the family home in La Center, WA, bank/investment accounts in his name, some personal property items, the 2016 Kia Sorrento, the family dogs, his firearms, and debts in his name. (CP 55)

In September 2018, Wendy received \$74,546.13 representing the remaining amount owed to her for the offsetting judgment, which accounted for the agreed to deduction of advanced funds, and \$2,400.00 being held by Appellant's brother. (CP 479 and 446-447) The \$2,400.00 was given to Wendy's brother in the event that Wendy incurred penalties from her tenancy or from breaking her apartment lease prematurely, since David's name was also on the lease agreement. (CP 86 and 479)

The parties agreed that no spousal support would be awarded to either party. (CP 10 and 18)

D. Wendy's mental health and competency evaluation

At the end of May 2017, more than one year prior to the parties' dissolution of marriage, Wendy experienced a mental health crisis,

attempting to commit suicide by taking pills (CP 359). Wendy was hospitalized from May 31, 2017 through June 6, 2017. (CP 359) Wendy was voluntarily hospitalized a second time twelve (12) days after coming home from her first hospitalization due to suicidal ideations. (CP 361) At the end of July 2017, Wendy began to participate in regular medication management and mental health care following those two hospitalizations. (CP 361-364) Wendy was on leave from her job at the FBI following these hospitalizations in 2017. (CP 319)

On January 19, 2018, Wendy's employer (FBI) conducted a psychological fitness for duty evaluation by both a psychologist and a psychiatrist, in order to determine if there were any disabilities and/or impairments that may affect her position as a research analyst. (CP 364 and 455) Per the psychologist's reports, Wendy was diagnosed with "Bipolar Disorder, Type 1, which is currently in remission." (CP 455) It was determined that Wendy was "psychologically fit for limited duty" and that she should "be allowed to return to work part-time, for at least three months, and transition to full-time . . ." (CP 455) Wendy received a letter from her employer (FBI) on March 14, 2018 confirming the same.

On March 20, 2018, Wendy asked to go to Fairfax, however it was not for mental health needs. (CP 87) Based upon David's observations and experience with Wendy, she did not need to be hospitalized at the time for mental health problems. She was, instead, doing what can only be

described as a manipulation to avoid adult, real-life issues and responsibilities, such as our failing marriage and her impending return to work. (CP 319) It should be noted that although Wendy's declaration claims that Wendy was admitted to Fairfax in March of 2018 for a manic episode and suicidal ideation (CP65), the medical information provided by Wendy (CP 365) does not include the suicidal ideation claim.

From December of 2017 through the time Wendy asked to go to Fairfax in March of 2018, Wendy had been taking her medication as prescribed, had been taking care of her mental health and had not displayed the behaviors that she displayed in May – July 2017. David has experienced Wendy's behavior when she is taking her medication and when she is not taking her medication. From December of 2017 through the end of June 2018 (and certainly from the time she returned from Fairfax in March of 2018 through the end of June 2018, Wendy was taking her medication as prescribed evidenced by Wendy behaving like her normal self, including being calm, rational, having even/normal energy levels, not displaying and erratic behavior, engaging in rational conversations, not being confrontational, her ability to complete plans and tasks and general healthy behavior. (CP 87-88)

Wendy often attempted to manipulate things to gain sympathy, win an argument, justify extravagant spending, or otherwise get whatever she wants when she is not getting her way (CP 319). David has experienced

Wendy's behavior when she is truly in the midst of a mental health crisis, as well as when she is simply using these manipulation tactics. David has also completed relevant training. (CP 319) (See Crisis Intervention Training Certificate) (CP 327)

Only Wendy's trial attorney claims that text messages from Wendy to David filed by Wendy are evidence of Wendy experiencing mental health problems. Wendy does not declare this in any of the declarations she filed in support of her motion for relief from judgment. Wendy is not exhibiting behavior indicative of a manic episode; she is acting out to avoid a difficult conversation and accountability for her actions. This is not new behavior related to her mental health. This is the very same manipulative behavior she has used throughout the parties' relationship, beginning well before her mental health symptoms began. (CP 320). It should be noted that similar text messages are not being sent by Wendy to David in the time surrounding her suicide attempt in the summer of 2017. (CP 151-159) Based on David's experience with Wendy, she writes using exaggerated, improper grammar and capitalization when she is upset, attempting to gain sympathy, or to avoid conflict." (CP 322)

From the time that Wendy returned from Fairfax in April of 2018 and through July 2018 when the divorce was finalized, Wendy's behavior was not evident of escalated mental health issues that would affect her capacity to make agreements. (CP 319)

E. The Parties' Agreed Final Orders

During the first week of April 2018 (after Wendy had returned from her voluntary stay at Fairfax), Wendy and David had conversations about dividing their assets, the amount of funds Wendy would receive, the parenting plan for their daughter and what David would receive in their divorce agreement to make sure they could keep their daughter in the house and in her private school. (CP 320)

On April 18, 2018, Wendy stopped by the house and told David that she wanted a divorce. David agreed that they should move forward with getting a divorce and suggested that she get an attorney, Wendy said that she didn't need an attorney and for David to handle it. She told David the terms she ultimately wanted as a settlement that day. (CP 321)

On April 19, 2019 at 11:40, David asked Wendy for a copy of the Subaru registration and her 2017 W2, saying "[a]pparently the divorce attorney needs that as well for the questionnaire." Wendy responds "Fur Sure leave in about 30 min or do u need it now...My W2 should be with tax papers... When is it needed give me a time." She proceeds to go to the house to find the documents, send photo of one, and tell David where she uploaded a copy. She is clearly capable of understanding her actions, cognizant and in agreement with providing these documents to the divorce attorney to proceed with the divorce. (CP 321)

On April 25, 2018, David filed a Petition for Divorce (CP 7-13) which was personally served on Wendy at her apartment that same day. (See Cover Page for Return of Service with attached return of service, filed on May 2, 2018, not designated by Wendy but identified and requested by be designated by David)

On April 26, 2018, Wendy was interviewed by FBI Resident Agent-in-Charge, in David's presence as requested by Wendy, to assess her readiness to return to work. In the parties text correspondence that day, Wendy abruptly started using improper grammar and capitalization to appear unwell and hinted that she was going to reschedule the interview. Regardless, Wendy was calm, clear and thoughtful at the interview and stated her desire to return to work on the following Monday, April 30, 2018. (CP 321)

Wendy's Response to Petition was signed by Wendy on May 3, 2018 and filed on May 8, 2018. (CP 17-21) In her Response Wendy indicated the following:

"Spousal Support (maintenance/alimony) I agree" (CP 18) in Response to the Petition that stated "Spousal Support is not needed." (CP 10)

"I ask the court to approve the following order about my marriage (check one):

Final Divorce Order (Dissolution Decree)" (CP 20)

Wendy declared that she signed a Response to Petition About a

Marriage admitting every provision. (CP 65) David declared that he

helped Wendy fill out the general information on the form (caption and case number) and then Wendy marked her answers to the questions, and Wendy signed and took possession of the form. David did not file this Response or take it to his attorney to file. (CP 322) Wendy filed a reply declaration on May 5 ,2019 that does not dispute this declaration which was made by David on March 1, 2019. When Wendy was over at the house on May 3, 2018, she reiterated exactly what she wanted as to the terms of the parties' divorce, the parties came to a verbal agreement on a global settlement, and then David's attorney proceeded to draft final orders in accordance with that agreement. (CP 322) Wendy does not dispute this.

On May 14, 2018, Wendy and David met at the Olive Garden by Wendy's apartment, had lunch, and signed the final orders. Wendy was calm and coherent during the meeting. She appeared ready to finalize things; they did not argue about the terms of the divorce and Wendy did not express any further concerns. (CP 322)

On May 16, 2018, Wendy stopped by the house to grab some items and agreed to meet the next day at David's attorney's office to sign paperwork for the house. When they were at David's attorney's office the next day, they found out that they had to wait ninety days to finalize the divorce. Wendy was coherent and calm; she insisted that they could be civil and wanted to get a meal to celebrate their "new journey." Wendy and

David had breakfast together at Joe Brown's Café in downtown Vancouver just after they signed the house papers. (CP 322)

On June 18 and 19, 2018, Wendy appeared to want to reconcile, which David firmly rejected. (CP 323) On July 1, 2018, Wendy was asking David to withdraw \$1,200 in IRA funds to purchase a new iPad she wanted, which is reflected in a text she sent to David that day. When David said no, she became extremely angry. The parties' daughter heard the discussion, came downstairs, and asked Wendy why she wouldn't just leave. Wendy then asked their daughter if she wanted Wendy to kill herself. Wendy then grabbed a large knife from the kitchen and left the home. She later texted that she is returning. This is not manic behavior; she was simply not getting her way and lashed out to manipulate David into assenting. (CP 324) Wendy explains that she responded inappropriately to their daughter. (CP 66) Wendy does not dispute David's description of the events or claim that she was experiencing a mental health crisis during this incident. Wendy resisted arrest and was charged with Malicious Mischief 3rd Degree, Criminal Trespass 2, Harassment and Obstructing a Law Enforcement Officer. (CP 66)

On July 11, 2018. Ms. Gaffney called David's attorney and let her know that she was representing Wendy in her Battleground criminal case. Mary Kay Gaffney practices in the areas of Family Law, Child Custody ... (CP 334) David's attorney was in communication with Ms. Gaffney about

the parties' divorce case from then until David's attorney's withdrawal, effective August 6, 2018. (CP 339) Ms. Gaffney was aware of both the agreed Stipulated Temporary Interim Order filed May 4, 2018 and that the parties had reached a global settlement and that final orders were planned to be filed at the end of the ninety day waiting period. (CP 339) Ms. Gaffney informed David's attorney of the court ordered competency evaluation in Wendy's criminal case. (CP 340) Additionally, Ms. Gaffney included David's attorney in correspondence to coordinate the retrieval of Wendy's personal property from the home. (CP 340)

In the criminal proceeding, the court ordered a competency evaluation for Wendy. (CP 339, 439) The court found that Wendy was "found competent to proceed." (CP 367 and 459-62) David's attorney waited to file the final orders until the competency evaluation with Western State Hospital was complete per Ms. Gaffney's suggestion. David's attorney received confirmation from Ms. Gaffney that Wendy was found to be competent on July 20, 2018. (CP 324) David's attorney then proceeded to file the Final Divorce Order on July 25, 2018 (CP 340)

All final orders were sent to Wendy by David's attorney's office when they were signed by the trial court. Wendy requested a copy of the Final Parenting Plan and Final Order of Child Support on July 27, 2018, which was provided to her. (CP 340) In response to receiving a copy of the Final Divorce Order, Findings and Conclusions about a Marriage; and

Declaration in Support of Entry of Final Divorce Order without a Hearing entered with the court on July 25, 2018, Wendy wrote back on July 27, 2018 as follows: “Samantha, Can you also send me the Final Parenting Plan and Final order of child support? Thank you, Wendy Miller” (CP 344-345)

F. Wendy’s motion to vacate judgment and motion for reconsideration

Wendy filed a Motion and Declaration for an Order to go to Court, Relief from Judgment and for Suit Fees, on November 5, 2018. On December 14, 2018, David filed a Response and Memorandum in Opposition to Motion for Relief from Judgment and supporting Declaration. On April 1, 2019, the trial court denied Wendy’s motion, finding that Wendy failed to provide an adequate basis in order to vacate, failed to meet the standard (clear and convincing evidence) by which to show her mental condition impeded her ability to understand and make decisions, and that the division of assets was agreed upon by both parties. (CP 434-37) The trial court also found that Wendy had acted on and benefited from the agreed final orders, after signing them but prior to the agreed orders being entered by the trial court, and that Wendy never requested maintenance in her response. (CP 434-437) Wendy then filed a Motion for Reconsideration on April 10, 2019. On May 3, 2019, the Trial Court denied Wendy’s Motion. (CP 432-33)

V. ARGUMENT

A. The trial court's denial of Wendy's motion for relief from judgment / to vacate the agreed final orders was not an abuse of the trial court's discretion.

There is no dispute that CR 60 motions are reviewed for an abuse of discretion by the trial court. Appellant's claim that it is an abuse of the trial court's discretion to deny a motion to vacate agreed orders/judgments so that a trial on the merits is not denied is not supported by Washington case law.

Absent fraud, overreaching, or collusion, the courts will not set aside a property settlement agreement. A simple showing of disparity in the division of property is not enough. *Marriage of Curtis*, 106 Wn.App. 191,194, 23 P.3d 13, *rev. denied*, 145 Wn.2d 1008 (2001) citing *In re Marriage of Burkey*, 36 Wn. App. 487, 489-90, 675 P.2d 619 (1984). The appellate court in *Curtis* rejected Wife's position and instead ruled that while the trial court certainly has the authority to reject a property settlement agreement, it is not obligated by statute to apply the specific factors set out in RCW 26.09.080 when deciding whether to accept or reject a property settlement. *Curtis* at 198. Appellant has included several quotes and case law cites involving cases where a party was defaulted and did not participate in the proceedings before an order/judgment was entered. It is not disputed that in that situation, Washington case law

favors orders/judgments resulting from a trial on the merits. Appellant cites to the following default cases where one of the parties did not participate in the proceedings: *Norton V. Brown*, 99 Wn. App. 118, 992 P.2d 1019 (1999), *Kennewick Irrigation Dist. v. 51 Parcels of Real Prop.*, 70 Wn. App. 368, 853 P.2d 488, rev. *denied*, 122 Wn.2d 1027 (1993), *White v. Holm*, 73 Wn.2d 348, 351-52, 438 P.2d 581 (1968), *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 599 P.2d 1289 (1979). For default cases the test consistent with Washington case law is detailed in *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007) citing to *White v. Holm*, 73 Wn.2d 348, 351-52, 438 P.2d 581 (1968). The four part test in analyzing whether to vacate a default judgment is not the test for agreed final orders/settlements reached while litigation is pending. There was no default order against Wendy. Wendy had a full opportunity to participate in the divorce case and present any information and evidence she chose to present to the court as she had not only been personally served with Petition for Divorce, she had appeared in the case twice after being personally served and prior to signing the agreed final orders.

Appellant additionally cites to *Haller v. Wallis*, 89 Wn.2d 539, 544 573 P.2d 1302 (1978). In *Haller*, the court held that the lower court did not abuse its discretion in denying the guardian's motion to vacate. *Haller* did not involve an order following a default and instead involved a motion to vacate the judgment following a settlement where the moving party

alleged that the court did not receive evidence at the hearing in support of an amended order. This case is more similar to the present case and demonstrates the difference between the need for a trial on the merits when a party has been defaulted verses the absence of that need when there has been no default. The agreed orders Wendy seeks to be vacated were not entered under rushed circumstances. David filed his Petition for Divorce on April 26, 2018 (CP 7-13). Wendy was personally served that same day at her separate apartment as the parties had already separated on April 16, 2018. (See Cover Page for Return of Service with attached Return of Service filed on May 2, 2018, not designated by Wendy but identified and requested to be designated by David) The agreed final orders were signed by the parties on May 14, 2018 and were not entered by the trial court until July 25, 2018. Wendy executed additional written agreements (CP 466-467) and a quit claim deed (CP 482-483) after signing the agreed final orders on May 14, 2018, but prior to the agreed final orders being filed on July 25, 2018. Wendy's criminal defense attorney was aware of the agreed final orders prior to them being signed by the parties. Neither Wendy or her criminal defense attorney communicated that Wendy changed her mind or otherwise no longer agreed to the terms of the agreed final orders to David or his attorney from the time Wendy signed the final orders on May 14, 2018 until Wendy filed her motion for relief from judgment on November 5, 2018. Wendy

thanked David's attorney for sending her a copy of the agreed Findings and Conclusions About a Marriage and the agreed final divorce order on July 27, 2018 and asked for copies of the earlier filed agreed Final Parenting Plan and agreed Child Support Order demonstrating her continued agreement, knowledge and understanding of the agreements she made with David that she knew were filed with the trial court.

Wendy is claiming that parties agreeing to final orders without engaging in formal discovery and without a trial on the merits rises to the level of "extraordinary circumstances." This claim is not consistent with Washington case law as to settlements or as to CR 60(b)(11). There is no requirement for "proceedings" when the parties reach a global settlement as to all pending issue in a dissolution case. The parties reached a global settlement based on their goals to keep their daughter in the family home with David and to keep their daughter in the private school that she had been attending. (CP 89) There is no evidence and Wendy does not claim in any of her declarations that she was not fully aware of the parties' property and debts in making the agreement she made with David. Wendy does not dispute in any of her declarations that she made the agreements she made as to the final orders. Finally, Wendy does not claim in any of her declarations that she was not taking her medication or was experiencing mental health issues on the day she signed the agreed final

orders, May 14, 2018, or the day the final orders were entered, July 25, 2018.

Appellant cites to *Hammack v. Hammack*, 114 Wn. App. 805, 810, 60 P.3d 663, *rev. denied*, 149 Wn.2d 1033 (2003). In *Hammack*, the issue involved a motion from relief from judgment resulting from violation of an agreement to waive all future child support for Wife in exchange for Husband receiving more than half of the parties' property. In violation of the parties' agreement, Husband filed to modify child support and seek support from Wife. The courts have upheld such agreements that included the calculation of an appropriate child support sum, the preservation of future support and the quantifying of the value of the property relinquished in lieu of paying future child support. See *Holaday v. Merceri*, 49 Wn.App. 321, 326, 742 P.2d 127, *review denied*, 108 Wn.2d 1035 (1987). The final Child Support order in this case does not deviate to \$0 in exchange for more property being awarded to David.

See *Hammack*, 114 Wn. App. 805, 810 (Wash. Ct. App. 2003), *In Re Marriage of Thurston*, 92 Wn. App. 494, 503 (1998) and *Knies v. Knies*, 96 Wn. App. 243, 251, 979 P.2d 482 (1999). *Hammack*, *Thurston* and *Knies* are all examples Washington case law supporting settlement agreements reached by the parties and using CR 60(b) to vacate judgments when one party takes action contrary to the parties settlement agreement.

Wendy does not claim in any of her declarations that the parties reached an agreement wherein David was to receive more property in exchange for Wendy not paying child support. This was not the parties' agreement. (CP 30-38) However, if the Court were to determine that the agreed final Child Support Order should be vacated, it does not lead to the additional conclusion that the agreed Final Divorce Order should also be vacated.

Appellant cites to *Flannagan v. Flannagan*, 42 Wn. App. 214, 221, 709 P.2d 1247 (1985), *rev. denied*, 105 Wn.2d 1005 in support of Wendy's claim under CR 60(b)(11). That case involved the states desire to retroactively apply the Uniform Services Former Spouses Protection Act which was a unique fact specific case. *Farmer v. Farmer*, 172 Wn.2d 616, 259 P.3d 256 (2011) involves a case where a party to a dissolution settlement fraudulently exercised all of the stock options awarded to the other party. This action, like the other cases cited above, went against the parties' agreement and the Court affirmed the trial court granting relief from judgment after one party violated the parties' agreement.

Wendy made no attempt to withdraw her settlement/agreement contained in the agreed final divorce order prior to expiration of the 90-day waiting period. Wendy was aware that there was a dissolution case pending because she had been personally served (See *Cover Page for Return of Service* with attached Return of Service, filed on May 2, 2018

,not designated by Wendy but identified and requested to be designated by David with this Responsive Brief) and had appeared in the case (CP 17-21 and 14-16) Wendy was aware of the terms of the agreed final divorce order evidenced by the document and written agreements she executed after signing the May 14, 2018 agreed Final Divorce Order, which include the quit claim deed she executed on May 17, 2018 (CP 482-483), the written agreement she signed on May 17, 2018 (CP 466) and the written agreement she signed on May 21, 2018 (CP 467).

Additionally, the trial court did not abuse its discretion in denying vacation of the final orders pursuant to CR 60(b)(1) as to CCLR 4.1(a) in ruling that David signing the declaration in lieu of testimony prior to 90 days expiring while filing it after 90 days expired does not constitute a sufficient irregularity with entry of the agreed final orders.

Appellant's arguments regarding a "rushed settlement" are false as the parties complied with the 90 day waiting period.

There is no evidence in the record to support Wendy's claim that Wendy was denying the marriage was irretrievably broken and/or unsure of the settlement proposed by David in the dissolution orders. In her Response, Wendy agreed to paragraph three of the Petition (CP 17). Wendy wanting to know if David would agree to reconciling and Wendy wanting additional time to decide if she was ready to finalize the parties' agreement is evidence of Wendy understanding that her decision was

important. (CP 289). David communicated that he wanted to finalize the divorce and did not want to reconcile (CP 290 and 294). Wendy subsequently decided to execute the agreed final orders and signed the agreed final orders on May 14, 2018 at Olive Garden (CP 291). As to the text messages In June of 2018, Wendy is asking to stay at the house due to her injured leg and David accommodates this (CP 298). There is no evidence in the record or in any of the declarations filed by Wendy that Wendy or David wavered as to the terms of the settlement reached by the parties. The focus on David's declaration in lieu of entry is misplaced as it was not part of the settlement reached by the parties. It was not one of the agreed orders that Wendy signed and agreed to, not a pleading required to be served on Wendy and was not a document that Wendy relied on in reaching the settlement she agreed to. The agreed Findings and Conclusions About a Marriage signed by both parties contained mirror information as to the marriage being irretrievably broken and as to the division of property being a fair and equitable division.

Appellant leaves out the word "made" from her quote of CCLR 4.1(a) and instead uses the word "signed" prior to the quoted language. CCLR 4.1(a) reads "The declaration in lieu of testimony must be made after the expiration of the ninety (90) day period." A pleading drafted for the court does not have legal effect until filed, its effect is therefore "made" at filing. So too is a declaration "made" when presented to the

court rather than when drafted. The declaration was not made to the court until the appropriate time. Wendy never disputed the statement in the declaration that the “marriage was irretrievably broken” or the statement that “the division of property contained in the Findings and Conclusions about a Marriage is a fair and equitable division” during the pendency of the parties’ dissolution case. Wendy completed and signed a Response to Petition About a Marriage on May 3, 2018 which agreed with both of the above claims. (CP 17-21). Wendy stated in her declaration in support of motion for relief from judgment that she “signed a Response to Petition About a Marriage admitting every provision.” (CP 65). Wendy signed agreed Findings and Conclusions about a Marriage which confirmed her agreement that “Divorce – This marriage is irretrievably broken.” (CP 45) and that “The division of real property described in the final order is fair (just and equitable).” (CP 45) Wendy signed agreed Findings and Conclusions About a Marriage confirming her agreement that “This document is an agreement of the parties May be signed by the court without notice to me.” (CP 48) and similarly signing an agreed Final Divorce Order confirming her agreement that “this document Is an agreement of the parties May be signed by the court without notice to me.” (CP 54) Wendy cannot claim that there was a dispute as to the above based on Wendy changing her mind as to the settlement she agreed to months later when she filed her motion for relief from judgment.

The cases cited by Appellant in support of Wendy's CR 60(b)(1) motion are not similar to the issues in this case. Appellant cites to *Jones v. Home Care of Washington, Inc.*, 152 Wn. App. 674, 216 P.3d 1106 (2009), *rev. denied*, 169 Wn.2d 1002 (2010). In *Jones*, parties to a class action suit had terminated their attorney. The attorney's withdrawal had not yet become effective yet the attorney was not served with a stipulation and order of dismissal as was required by CR 5(b)(1) and the case was dismissed preventing a putative class from intervening in the case as the case had been dismissed. The Court held that the putative class was prejudiced by the failure to serve and that the trial court abused its discretion in denying the putative class's motion to vacate. These facts do not apply to the present case. In the present case, Wendy and David signed agreed final orders and part of those agreed final orders included the agreement that the orders "May be signed by the court without notice." (CP 48 and 54) There was no required notice violated and there was no prejudice in the present case. Similarly, *Kennewick Irrigation Dist. v. 51 Parcels of Real Prop.*, 70 Wn. App. 368, 853 P.2d 488, *rev. denied*, 122 Wn.2d 1027 (1993) involves a motion to vacate a default order of foreclosure due to the fact that the court was never made aware that the property owner had tendered a cashier's check several months earlier. This case involved a default order, not an agreed order or judgment.

Appellant misrepresents RCW 26.09.030 by citing to subsection (c)(ii) when subsection (a) is the appropriate subsection for this case because Wendy's Response to a Petition About a Marriage did not deny that the marriage was irretrievably broken. (CP 17) To clarify, RCW 26.09.030 reads as follows:

When a party ... petitions for a dissolution of marriage or dissolution of domestic partnership, and alleges that the marriage or domestic partnership is irretrievably broken and when ninety days have elapsed since the petition was filed and from the date when service of summons was made upon the respondent or the first publication of summons was made, the court shall proceed as follows:

(a) If the other party joins in the petition or does not deny that the marriage or domestic partnership is irretrievably broken, the court shall enter a decree of dissolution. (emphasis added)

RCW 26.09.080 lists relevant factors (including factor (4) cited to by Appellant) that a court is required to consider when a court makes a disposition property and liabilities. Wendy and David agreed to a disposition of their property and liabilities as detailed in agreed final divorce order. (CP 52, 55 and 56) and both Wendy and David represented to the trial court in the agreed Findings and Conclusions About a Marriage that division of real property, personal property and debts described in the agreed Final Divorce Order is fair (just and equitable). (CP 45 and 46) and that the basis for that was "spouse's agreement." (CP 44) There is no statute or case law that prevents parties to a dissolution of marriage case from settling all issues between them prior to the expiration of the ninety

(90) day waiting period. It is only the court that is restricted from entering a final divorce order prior to expiration of the ninety (90) day waiting period pursuant to RCW 26.09.030 (emphasis added).

The final orders being signed by Wendy and David less than ninety (90) days after David filed the Petition for Dissolution was not an irregularity under CR 60(b)(1) warranting vacation and it did not undermine the policy underlying RCW 26.09.030 or the statutory waiting period.

1. There was no bad faith on the part of David involved in the parties signing agreed final orders.

The trial court did not abuse its discretion in refusing to vacate the three out of four agreed final orders Wendy sought to vacate pursuant to CR 60(b)(11). Wendy alleges bad faith by David, however there is no evidence in the record to support this claim. CR 60(b)(11) is “intended to serve the ends of justice in extreme, unexpected situations and when no other subsection of CR 60(b) applies.” *Shandola v. Henry*, 198 Wn. App. 889, 895, 396 P.3d 395 (2017). CR 60(b)(11) “applies to extraordinary circumstances involving irregularities extraneous to the proceeding.” *Shandola*, 198 Wn. App. at 895. The allegation of “bad faith” should be analyzed under CR 60(b)(4), not CR 60(b)(11). No cases cited by Appellant hold otherwise.

Appellant cites to *Yearout v. Yearout*, 41 Wn. App. 897, 707 P.2d 1367 (1985). In *Yearout*, the court of appeals affirmed the trial court's ruling denying a motion to modify spousal support when the parties had agreed to non-modifiable spousal maintenance in the divorce decree. As to CR 60(b)(11), the court of appeals in *Yearout* held that

the use of CR 60(b)(11) "should be confined to situations involving extraordinary circumstances **not covered by any other section of the rule.**" *State v. Keller*, 32 Wash. App. 135, 140, 647 P.2d 35 (1982). Such circumstances must relate to irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings. *Keller*, 32 Wn. App. at 141. The courts have stressed the need for the presence of "unusual circumstances" before CR 60(b)(11) will be applied. *In re Henderson*, 97 Wash. 2d 356, 360, 644 P.2d 1178 (1982). In this case, Mr. Yearout's complaints as to the separation agreement's unfairness and his allegedly unstable emotional condition at the time of the original decree do not constitute extraordinary circumstances that would justify relief under CR 60(b)(11). *Yearout*, 41 Wn. App. at 902 (emphasis added).

Wendy's CR 60(b)(11) claim is primarily based on her mental health which she claims interfered with her ability to enter into agreed final orders. A motion for relief from judgment based on a parties' mental health should be assessed under CR 60(b)(2). Since that section of the rule addresses the issue raised by Wendy, her claims should be evaluated and decided under CR 60(b)(2), not CR 60(b)(11).

Appellant claims that David's bad faith is based on David violating his fiduciary duty to Wendy. Appellant cites to *Marriage of Lutz*, 74 Wn. App. 356, 369, 873 P.2d 566 (1994) (quoting *Peters v. Skalman*, 27 Wn. App. 247, 251, 617 P.2d 448, rev. denied, 94 Wn.2d 1025 (1980),

Marriage of Sanchez, 33 Wn. App. 215, 218, 654 P.2d 702 (1982), and *Seals v. Seals*, 22 Wn.App. 652, 655, 590 P.2d 1301 (1979) claiming that David violated his fiduciary duty to Wendy.

Lutz involved a spouse transferring title to property to his sister during his dissolution case with the agreement that his sister would transfer title back to him after the dissolution. The bad faith and violation of fiduciary duty in *Lutz* is an act of purposeful deception. There is no purposeful deception by David. Wendy does not claim that David misrepresented anything to her affecting the final divorce orders nor did she claim that David hid or concealed property from Wendy. *Peters v. Skalman* makes a distinction as to a spouse's responsibility to the other spouse before and after separation. The Court held that termination of the marriage relieves the managing spouse of his or her duty to act for the benefit of the lapsed community and that the termination can result from a defunct marriage at the time of separation. *Peters v. Skalman* at 252. The Court went on to find that after separation there was no legal barrier preventing Husband from claiming adversely to Wife's interest in property of the former marital community. *Peters v. Skalman* at 253. *Marriage of Sanchez* involved an antenuptial agreement. There was no antenuptial agreement between Wendy and David.

Seals involved a spouse who did not reveal the existence of property prior to dissolution despite the fact that he was asked to do so in a

discovery request issued by his spouse's attorney. The Court held "Where a party to a dissolution action, in clear and unambiguous terms, in response to interrogatories () asserts the nonexistence of a fact, of which that party has or should have knowledge, the requesting party may rely on such statements. The exercise of reasonable diligence does not require a party to look behind the answers." *Seals at 656 citing Kurtz v. Fels*, 63 Wash. 2d 871, 389 P.2d 659 (1964). *Seals* again confirms that a misrepresentation is required. There was no misrepresentation by David.

Appellant cites to *Marriage of Cohn*, 18 Wn. App. 287, 309-10, 879 P.2d 388 (1995) as holding that it is David's burden to prove he acted in good faith. Like the husband in *Cohn*, David did not engage in fraud, undue influence, pressure, coercion or misrepresentation. *Cohn* held that a spouse should not have been penalized for the former spouse's failure to request additional information regarding the value of his property if she lacked any knowledge of such value. *Cohn* at 507-508. This is the situation in this case. There is no evidence that Wendy was unaware of the value of property in David's name. The parties had a home, vehicles, credit card debt and retirement accounts. Both parties worked for the federal government at the time of divorce and both parties have Federal pensions and Federal TSP retirement accounts through that employment. In her declaration filed with the trial court on April 10, 2019, Wendy states that she knows David's federal retirement accounts are higher in

value to her own and that she knows that David's TSP account is over \$500,000 in value. (CP 389) Wendy makes no claims in any of her declarations that she was unaware of the value of property in David's name and makes no claims in any of her declarations that David misrepresented or concealed the value of property in David's name. None of the text messages filed by Wendy show and none of Wendy's declarations claim that Wendy was unsure about the terms of the parties' agreed orders. There are text messages prior to Wendy deciding to sign the agreed final orders where Wendy inquires about reconciling and there are texts where Wendy asks for additional time to decide. However, there is nothing in evidence showing David did anything to mislead Wendy. David clearly communicates he does not want to reconcile. David accommodates Wendy's requests for additional time to decide prior to signing the agreed final orders containing their agreed settlement terms. Wendy presented no evidence claiming otherwise. Wendy does not dispute David's testimony that the parties had previously reached a global settlement on May 3, 2018 and that final orders were drafted in accordance with Wendy and David's global agreement (CP 322) and does not dispute David's testimony that the parties ultimately, met at the Olive Garden by Wendy's apartment, had lunch, and signed the final orders, that Wendy was calm and coherent during the meeting, that Wendy appeared ready to finalize things, that Wendy and David did not argue about the

terms of the divorce and that Wendy did not express any further concerns, (CP 322) in any of her declarations filed with the trial court. Additionally, Wendy did not dispute David's testimony that on April 18, 2018, Wendy stopped by the house and told him that she wanted a divorce, that David agreed that they should move forward with getting a divorce and suggested that she get an attorney, that Wendy then told David she doesn't need an attorney and for David to handle it and that Wendy told David the terms she ultimately wanted as a settlement. (CP 321) The parties ended up meeting at the Olive Garden later in the day instead of a coffee shop to review and sign the agreed final orders. Nowhere in Wendy's declarations does she claim that she did not have enough time to review and understand the agreed final orders before signing them.

Appellant cites to *Marriage of Bernard*, 165 Wn.2d 895, 204 P.3d 907 (2009) to claim that Wendy did not have enough time to review and understand the dissolution orders. *Bernard* involved a prenuptial agreement where the wife claimed that she was rushed *Bernard* at 909. As with prenuptial agreements, this Court should be looking at evidence at the time of execution. There is nothing in any of Wendy's declarations filed in support of her motion for relief from judgment claiming that at the time of execution she did not have enough time to review the agreed orders. There is nothing in the text messages Wendy submitted showing Wendy making this claim to David after she signed the agreed final orders.

Additionally, because *Bernard* involved a prenuptial agreement, the wife in that case was faced with the choice of the humiliation of calling off a wedding or signing a substantively unfair document. *Bernard* at 910. No such pressure existed at the time Wendy executed the agreed final orders.

Wendy claims that in order to prove good faith, David was required to explain to Wendy, why it is so important that she seek the advice of independent counsel. Appellant cites to *Marriage of Foran*, 67 Wn. App. 242, 254, 834 P.2d 1081 (1992) as support for this claimed requirement. *Foran* involves a prenuptial agreement where the wife testified that she was under a great deal of pressure in the days leading up to the execution of the contract, as the result of preparing for the wedding trip and because of matters involving the husband's trucking business, including a potential lawsuit over the purchase of a truck and that she knew she would be hit by her soon to be husband if she did not sign the paper. *Foran* extended prior decisions in *Matson* and *Crawford* to hold that when a prenuptial agreement is patently unreasonable, independent counsel is required. *Foran* at 249. Prenuptial agreements are not similar to settlement agreements reached during a pending dissolution of marriage case. There is no similar requirement to have independent counsel in order to sign and enter agreed final orders during the pendency of a dissolution case. Appellant cites to *Hansen v. Hansen*, 24 Wn. App. 578, 580, 602 P.2d 369 (1979). *Hansen*, like the prenuptial cases cited by

Appellant involve a situation where one party to a dissolution case challenged a prior agreement made between the parties (made prior to either party filing a dissolution case). Husband in *Hansen* challenged the parties' separation agreement during the dissolution case. This case, as well as the other separation contract and the other prenuptial cases cited by Appellant are distinguishable from this case because unlike those cases, Wendy and David's agreed final orders were not made prior to the pendency of their dissolution case and Wendy did not challenge the parties' agreement during Wendy and David's dissolution case. The separation agreement, prenuptial agreement and postnuptial agreement cases cited to by Appellant are not cases involving a CR 60(b) motion for relief from judgment. These cases are not applicable to this case.

B. The trial court did not abuse its discretion in refusing to vacate the agreed final orders based on Wendy's claim that she entered into those agreed final orders without informed consent.

Appellant cites to *Haller v. Wallis*, 89 Wn.2d 539, 544, 573 P.2d 1302 (1978) in support of Appellant's claim that the law favors settlements and their finality because settlement are generally entered into by parties with the aid of counsel after having the merits of their claim or defense examined. Appellant's cite to *Haller* is misleading as *Haller* is not a case where the merits of the case were determined by the trial court and not a

case granting a motion to vacate. Instead, *Haller* is an appeal where a guardian ad litem of a minor child asked for a settlement to be vacated claiming her attorney did not have authority to enter the settlement. The Court held that once a party has designated an attorney to represent him in regard to a particular matter, the court and the other parties to an action are entitled to rely upon that authority until the client's decision to terminate it has been brought to their attention. *Haller* at 547. It should be noted that in *Haller*, the Court confirms that a judgment approving a settlement differs from a judgment by default. *Haller* at 544.

In addition to *Haller*, discussed above, Appellant cites to *Morgan v. Burks*, 17 Wn. App. 193, 199, 563 P.2d 1260 (1977) and to *Graves v. P.J. Taggares Co.*, 25 Wn. App. 118, 126, 605 P.2d 348 (1980), *rev. denied*, 93 Wn.2d 1015 (1980) in support of Wendy's CR 60(b)(11) motion claiming the agreed final orders should be vacated because she did not have informed consent in executing the agreed final orders. These cases involve informed consent as between a client and the client's attorney and generally hold that the claim lies between the client and their attorney rather than creating a valid claim for relief pursuant to CR 60(b).

Appellant makes a claim that the agreed final orders should be vacated due to Wendy's lack of mental capacity pursuant to CR 60(b)(2). The phrase "unsound mind" is not defined by this rule. However, it is

defined in Washington law in the witness competency statute, RCW 5.60.050, in the witness competency rule, CrR 6.12(c) and in *State v. Smith*, 97 Wn.2d 801, 650 P.2d 201 (1982) where the Court held that “unsound mind” means total lack of comprehension or the inability to distinguish between right and wrong. See *State v. Smith* at 803 and also see *State v. Wyse*, 71 Wn.2d 434, 436, 429 P.2d 121 (1967) (equating “unsound mind” with “insanity”).

Wendy argues David used Wendy’s incapacity against her and to defraud the trial court by not revealing Wendy’s incapacity to the trial court and obtaining an inequitable settlement in his favor. However, Wendy has not presented evidence that she lacked capacity when she signed the agreed final orders on May 14, 2018 (or when those agreed final orders were entered by the trial court on July 25, 2018). David does not agree that Wendy lacked capacity on either date. Wendy’ claim of incapacity is not specific to either May 14, 2018 or July 25, 2018 and instead is based solely on her mental health diagnosis. A mental health diagnosis does not equate to lack of capacity. Wendy has not claimed that she was experiencing a mental health symptom escalation and Wendy has not claimed that she was not taking her medication or claimed anything else specifically caused her to lack capacity on May 14, 2018 (or July 25, 2018). Wendy has not asked the that the agreed final Parenting Plan she

signed on May 14, 2018 be vacated along with the other three agreed final orders. Wendy was found competent to proceed in her criminal case on July 20, 2018 (CP 340 and 342), stated in an order on July 26, 2018 (CP 459)

Appellant cites to *Shaffer v. Shaffer*, 47 Wn. App. 189, 195, 733 P.2d 1013, *rev. denied*, 108 Wn. 2d 1024 (1987) and *Page v. Prudential Life Ins. Co. of America*, 12 Wn.2d 101, 109, 120 P.2d 527 (1942) in support of this claim. However, *Shaffer* does not involve the issue of mental capacity. *Shaffer* involves a separation agreement that was entered into prior to a dissolution of marriage case being filed and therefore is not similar to the issues in this case for reasons discussed above. *Page v. Prudential Life Ins. Co. of America* did involve the issue of mental capacity in relation to an insured cash surrendering his life insurance policies before his death. The Court held that to avoid a contract "it is insufficient to show merely that the party was of unsound mind or insane when it was made, but it must also be shown that this unsoundness or insanity was of such a character that he had no reasonable perception or understanding of the nature and terms of the contract. The extent or degree of intellect generally is not in issue, but merely the mental capacity to know the nature and terms of the contract." *Page v. Prudential Life Ins. Co. of America* at 109. There is no evidence and Wendy does not testify in any declarations filed with the trial court that she was not taking her

medication when she signed the agreed final orders on May 14, 2018.

There is no evidence and Wendy does not testify in any declarations filed with the trial court that her mental health was of such a character that she had no reasonable perception or understanding of the nature and terms of the agreed final orders when she signed them on May 14, 2018. At most, Wendy claims that she did not read the documents and did not understand the ramifications of her actions. (CP 67) She did claim without specifics that she did not have the ability to comprehend right from wrong, apparent from her medical history and her actions, before during and after, the final Divorce Order was entered. (CP 67) The final divorce order was entered on July 25, 2018. Wendy signed the agreed final orders on May 14, 2018. Wendy did not submit any evidence to the trial court as to whether she lacked any reasonable perception or understanding of the nature and terms of the contract. David testified in his December 14, 2018 declaration that he had first hand knowledge that Wendy was competent and fully capable of understanding the terms of the final divorce orders she agreed to and signed on May 14, 2018, that David has experienced Wendy's behavior when she is taking her medication and when she is not taking her medication, that from December of 2017 through the end of June 2018 (and certainly from the time she returned from Fairfax in March of 2018 through the end of June 2018, Wendy was taking her medication as prescribed evidenced by Wendy behaving like her normal self, including

being calm, rational, having even/normal energy levels, not displaying and erratic behavior, engaging in rational conversations, not being confrontational, her ability to complete plans and tasks and general healthy behavior. (CP 87-88) David testified that Wendy did not lack capacity due to her mental health. (CP 88) and that from the time that Wendy returned in April 2018 and through July 2018 when the divorce was finalized, Wendy's behavior was not evident of escalated mental health issues that would affect her capacity to make agreements. (CP 319) Wendy was also found competent, not only to stand trial in the criminal case, but to work for the FBI with security clearance. (CP 88, CP 455, CP 459) On April 26, 2018, after leaving Fairfax, Wendy was interviewed by FBI Resident Agent-in-Charge, in David's presence as requested by Wendy, to assess her readiness to return to work. Wendy was calm, clear and thoughtful at the interview and stated her desire to return to work on the following Monday, April 30, 2018. Wendy later told David that she was then taking additional time off for an alleged leg injury. (CP 321)

Appellant claims this case is analogous to *Barr v. MacGuggan*, 119 Wn. App. 43, 78 P.3d 660 (2003) where the court granted relief under CR 60(b)(11). However, in *Barr*, the Plaintiff's attorney had been suffering from clinical depression which led to him missing discovery deadlines and an order to compel resulting in Plaintiff's case being

dismissed. This is not a case involving CR 60(b)(2) and is not a case involving agreed final divorce orders.

Appellant argues that David breached his fiduciary duty by failing to provide Wendy with a full and fair disclosure of all material facts related to the amount, character and value of the property involved. Appellant cites to *Friedlander v. Friedlander*, 80 Wn.2d 293, 302, 494 P.2d 208 (1972), which is a case involving a prenuptial agreement that has a different test than settlement agreements reached during pending litigation between spouses due to reasons discussed above. Appellant claims that Wendy disputes that the terms of the parties' settlement agreement were terms that Wendy wanted as a settlement. David testified to this in his December 14, 2018 declaration that keeping their daughter in the home and continuing their daughter's attendance at her private school were the two main reasons expressed by Wendy in coming to the terms of the agreed Final Divorce Order. (CP 89) and that during the first week of April 2018, Wendy and David had conversations about dividing their assets, the amount of funds Wendy would receive, the parenting plan for their daughter and what David would receive in the divorce agreement to make sure Wendy and David could keep their daughter in the house and in her private school. (CP 320) Then again on April 18, 2018, Wendy stopped by the house and told David that she wants a divorce and told him what she wanted as a settlement. (CP 321). Wendy does not claim that

the terms of the parties' agreed final orders were not terms she wanted as a settlement in any of her declarations, even in her declarations filed after David's declarations claiming the same. Wendy also does not claim in any of those declarations that she was not aware of all material facts needed to determine if she wanted to enter into the settlement agreement, Wendy does not claim that she was not aware of the nature, value or extent of property in David's name or of property awarded to David in the agreed final orders. Wendy makes no claims in any of her declarations that David misrepresented or concealed property or the value of property. Wendy's attorney's memorandums claiming this is not evidence and is not Wendy's testimony.

Appellant's cites to *Seals v. Seals*, 22 Wn.App. 652, 590 P.2d 1301 (1979) where the Court vacated a dissolution decree under CR 60(b)(4) when the husband in that case failed to disclose community property to the wife (stock shares and multiple accounts) and the wife had little knowledge of the husband's assets. The Court found that husband engaged in fraudulent conduct. David did not engage in fraudulent conduct. Appellant cites to *Marriage of Burkey*, 36 Wn.App. 487, 490, 675 P.2d 619 (1984) as authority for claiming that a spouse breaches his fiduciary duty by failing to disclose the value of community assets to the other spouse. This is misleading because the appellate court in *Burkey* reversed a trial court's decision to vacate a dissolution decree finding that

there was no breach of a fiduciary duty to disclose the value of certain marital property because the evidence showed that both parties were cognizant of the value of the real and personal property owned by the community and that neither kept valuation information from the other. The Court in *Burkey* cites to Policy reasons favoring the finality of divorce settlements which were set forth in *Peste v. Peste*, 1_Wash. App. 19, 25, 459_P.2d_70 (1969) as follows: To permit collateral attacks upon divorce proceedings without any more than a showing of a disparity in the award, would open a Pandora's Box, affecting subsequent marriages, real property titles and future business endeavors of both spouses. *Burkey* at 489. The Court goes on to distinguish *Seals* in holding that the situation in *Burkey* is unlike that in *Seals v. Seals*, 22_Wash. App. 652, 590_P.2d 1301 (1979), where the court held the husband had breached his fiduciary duty by failing to disclose to his wife the *existence* of certain property prior to dissolution. The full disclosure mandated by the fiduciary relationship assumes that one party has information which the other needs to know to protect his interests. *Burkey* at 490. These are not the facts of the present case.

Appellant misleads the Court in not making clear that the appellate court in *Maddix va. Maddix*, 41 Wn.App. 248, 253, 703 P.2d 1062 (1985) involved an allegation by wife that she had asked her husband about the value of the business prior to agreeing to the property settlement and had

been told by her husband that it had no value. *Maddix* at 249. The Court in *Maddix* went on to hold that “based on the rule of full disclosure, if the evidence proves a party had knowledge of the true value of the business, or at least sufficient notice to protect their interests prior to the entry of the final decree, it was incumbent upon them at that time to examine more closely the value before proceeding with the dissolution. If they voluntarily chose not to do so, they should not be allowed to return to court to do what should have been done prior to entry of the final decree.” *Maddix* at 253.

The claimed “misconduct” and “violation of fiduciary duty” Wendy makes is simply that according to Wendy, “the division of property was not fair or equitable” In this case, there is evidence that Wendy knew that the parties’ federal retirement benefits were disparate with David’s being more valuable than her own. She does not claim lack of knowledge as to value in any of her three declarations filed with the trial court. Wendy should not be able to claim lack of knowledge of value on appeal when she did not claim the same in support of her motion for relief from judgment in the trial court below.

Appellant cites to *Marriage of Curtis*, 106 Wn.App.191, 197, 23 P.3d 13, rev. denied, 145 Wn.2d 1008 (2001) where the appellate court declined to vacate a decree of dissolution when the wife was asking them to do so based on the overall fairness of the settlement where the wife

chose to enter into a settlement knowing of the existence of her husband's business, but without valuing her husband's medical practice. The Court in *Curtis* held Absent fraud, overreaching, or collusion, the courts will not set aside a property settlement agreement. A simple showing of disparity in the division of property is not enough. *Curtis* at 194 citing *In re Marriage of Burkey*, 36 Wn. App. 487, 489-90, 675 P.2d 619 (1984).

The duty to value an asset is on the parties when they know of the asset's existence. *Curtis* at 197 citing *In re Marriage of Maddix*, 41 Wn. App. 248, 253, 703 P.2d 1062 (1985); *Burkey*, 36 Wn. App. at 489-90. A party who voluntarily chooses not to value an asset before settlement "should not be allowed to return to court to do what should have been done prior to entry of the final decree." *Curtis* at 197 citing *Maddix*, 41 Wn. App. at 253.

"[t]o permit collateral attacks upon divorce proceedings without any more than a showing of a disparity in the award, would open a Pandora's Box, affecting subsequent marriages, real property titles and future business endeavors of both spouses." *Curtis* at 197 citing *Burkey*, 36 Wn. App. at 489 (citing *Peste v. Peste*, 1 Wn. App. 19, 25, 459 P.2d 70 (1969)).

Wife in *Curtis* was asking the appellate court to conclude that a trial court has to apply the factors in 26.09.080 to agreed settlements in a dissolution case. The appellate court in *Curtis* rejected Wife's position

and instead ruled that while the trial court certainly has the authority to reject a property settlement agreement, it is not obligated by statute to apply the specific factors set out in RCW 26.09.080 when deciding whether to accept or reject a property settlement. *Curtis* at 198.

Curtis includes the test for agreed final orders based on settlement agreements reached after a case is filed. This is a different test than the test required for prenuptial, postnuptial and other property agreements made prior to a case being filed. The reason for this difference is in the very different positions the parties find themselves. Settlements reached during litigation between the parties does not present the same concerns as the parties are adverse to each other and have current pending issues. Washington encourages settlements between parties and the finality of those settlements. The fiduciary duty that remains after a dissolution case is filed and served is one that requires a spouse to be honest about the existence and value of property by not committing fraud, overreaching or collusion. Wendy does not claim any misrepresentations by David in the agreements reached by the parties and does not claim she was not aware of the existence of property held by both parties. Wendy does not allege that she did not agree to the agreed final orders. Wendy asks this court to find that the trial court abused its discretion in refusing to vacate three out of four agreed final orders based on Wendy's claimed disparate division of

property in David's favor. Setting aside the fact that David is the primary parent and Wendy's child support obligation was lowered despite the fact that she was still employed by the FBI when the parties entered into their settlement agreement and was still employed by the FBI when the agreed final orders were entered by the trial court, David did not breach his fiduciary duty, did not commit fraud and did not otherwise misrepresent any information to Wendy.

1. The trial court did not abuse its discretion in refusing to vacate the agreed final orders as there was no undue influence by David.

Appellant cites to *Marriage of Bernard*, 165 Wn.2d 895, 906, ¶ 25, 204 P.3d 907, again pointing to a prenuptial case that is not the controlling Washington law for settlement agreements reached during a pending dissolution case and *Peters v. Skalman*, 27 Wn.App. 247, 255, 617 P.2d 448 (1980) in regards to undue influence, citing to facts that may rise to concluding that a donee engaged in undue influence over a donor. This law is not applicable to the present case as there is not a donor/donee relationship. Wendy's only claim is that after she was terminated by the FBI in August of 2018 (CP 85) (which occurred three months after the parties entered into their written agreements and the month after the parties' written agreements were entered by the trial court), that she then decided that the agreed to property division is unfair and disparate. This is not evidence of undue influence. It is not disputed that a party may seek

relief from a judgment and does not waive appeal when they follow the terms of the judgment, including accepting property awarded to them in the judgment. The trial court in this case did not rule otherwise. The trial court was referring to actions Wendy took after signing the agreed final orders on May 14, 2018 but before the final orders were entered by the trial court on July 25, 2018. This included executing a quit claim deed (CP 82-83) and entering into additional written agreements referring the terms of the agreed final orders. (CP 66-67). These additional written acts by Wendy demonstrated her understanding and continued agreement to the agreed final orders signed on May 14, 2018.

Need Based Attorney Fees: Wendy requested \$7500 in attorney fees as part of her CR 60(b) motion. Wendy had received over \$77,000 two at the beginning of September 2018 (CP 479). Wendy's deposition testimony confirms she still has the majority of the funds she received in September of 2018. (CP 86) Attorney fees in a dissolution proceeding are based on need and ability to pay. RCW 26.09.140; *In re Marriage of Terry*, 79 Wn. App. 866, 871, 905 P.2d 935 (1995). A trial court's attorney fee award is reviewed for abuse of discretion. *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 591, 291 P.3d 906 (2012). The party challenging a fee award bears the burden of showing it was "clearly untenable or manifestly unreasonable." *Wash. State Comm'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 219, 293 P.3d 413 (2013).

The Court should not award attorney fees to Wendy on appeal pursuant to RCW 26.09.140 and RAP 18.1.

Wendy's request for attorney fees on appeal is a need based request. David objects to this request because Wendy has financial resources sufficient to pay her attorney fees on appeal and therefore has no need for David to contribute funds towards her attorney fees.

VI. Conclusion

For the foregoing reasons, this Court should affirm the trial court's decision and deny Wendy's request for attorney fees on appeal.

Dated this 16th Day of March, 2020.

STAHANCYK, KENT & HOOK, P.C.

By: 

Michelle L. Prosser
WSBA No. 46487
Attorney for Respondent

STAHANCYK, KENT & HOOK PC

March 16, 2020 - 5:01 PM

Transmittal Information

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IN THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CLARK COUNTY SUPERIOR COURT NO. 18-3-03044-4

In re the Marriage of:

DAVID MILLER.

Respondent.

v.

WENDY MILLER.

Appellant.

AFFIDAVIT OF SERVICE

Michelle L. Prosser, WSBA #47486
Stahancyk, Kent & Hook, P.C.
400 West 11th Street
Vancouver, WA 98660
Telephone: (360) 750-9115

I, Michelle L. Prosser, being first duly sworn upon oath, hereby deposes and says:

1. I am the attorney for Respondent David Miller. I am competent to testify herein, and I base the following on my own, personal knowledge.

2. On March 16, 2020, I caused true and correct copies of the Brief of Respondent to be served on the following below by E-Mail.

3. On March 17, 2020, I caused true and correct copies of the Brief of Respondent and Affidavit of Service to be served on the following by depositing in the United States Mail, postage prepaid as shown:

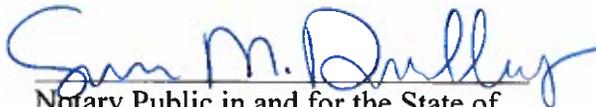
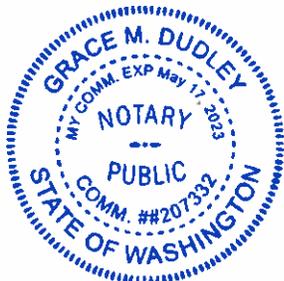
Lou M. Baran
303 East 16th Street, Suite 109
Vancouver, WA 98663
baranlaw@comcast.net

Valerie A. Villacin
Jonathan B. Collins
Smith Goodfriend, P.S.
1619 8th Avenue North
Seattle, WA 98109
valerie@washingtonappeals.com
jon@washingtonappeals.com



Michelle L. Prosser, WSBA #47486

SUBSCRIBED AND SWORN to before me this 17th day of March, 2020.



Notary Public in and for the State of Washington, residing at Vancouver
Commission expires: 5/17/23

STAHANCYK, KENT & HOOK PC

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